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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-1013

ANTHONY L. BRONCUCIA,
Petitioner,
v.
THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

On Petition for Writ of Certiorari
To the Colorado Supreme Court

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ANTHONY L. BRONCUCIA, *Petitioner*,	)	
v.	)	ENTRY OF APPEARANCE
THE PEOPLE OF THE STATE OF COLORADO, *Respondent*.	)	

Brooke Wunnicke states that (1) she is the Special Prosecutor in the above-captioned case by appointment of Dale Tooley, District Attorney in and for the Second Judicial District, State of Colorado, and (2) she hereby enters her appearance in such capacity in the captioned cause.

Dated March 16, 1976.

BROOKE WUNNICKE
Special Prosecutor

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Colorado Supreme Court is reported as *People v. Broncucia*, Colo., 540 P.2d 1101 (1975).

JURISDICTION

The judgment of the Colorado Supreme Court was entered on September 15, 1975. A petition for rehearing was denied October 20, 1975, and the petition for a writ of certiorari was filed on January 16, 1976. The jurisdiction of this Court is invoked under Rule 19(1) (a)

of the Revised Rules of the Supreme Court of the United States, 28 U.S.C.A.

QUESTIONS PRESENTED

1. Whether the United States Supreme Court should grant certiorari to decide an alleged federal question which was *not* decided by the Colorado Supreme Court.

2. Whether a matter of state law becomes a federal question solely because of petitioner's allegation that it is so.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

United States Constitution, Amendment Five:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment Fourteen:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 19, Revised Rules of the Supreme Court of the United States. *Considerations governing review on certiorari*.

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

STATEMENT

Anthony L. Broncucia (hereinafter "Petitioner") was convicted of perjury and conspiracy to commit perjury, in the District Court of the City and County of Denver. The conviction for perjury was reversed by the Colorado Supreme Court, and the conviction for conspiracy to commit perjury was affirmed. *People v. Broncucia*, Colo., 540 P.2d 1101 (1975.) Rehearing was denied by the Colorado Supreme Court on October 20, 1975.

Petitioner filed a petition for a writ of certiorari in the Supreme Court of the United States on January 16, 1976.

For purposes material herein, the People accept the statement of facts as found in the opinion of the Colorado Supreme Court, attached hereto as Appendix A and incorporated here by this reference.

SUMMARY OF ARGUMENT

Petitioner's conviction for conspiracy to commit perjury at an extradition hearing has been affirmed by the Colorado Supreme Court. In its opinion, the Colorado Supreme Court cited no United States decisions or statutes, but relied entirely upon Colorado law.

Granting certiorari in this case would be improvident, because nothing in the record indicates that "a state court has *decided* a *federal* question of substance not theretofore determined by this court, or has *decided* it in a way probably not in accord with applicable decisions of this court." Rule 19(1) (a), Revised Rules of the Supreme Court of the United States. (Emphasis added.)

Petitioner seeks to *create* a federal question by discussing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Yet the trial court found that Petitioner had been given adequate *Miranda* warnings (f. 795), and that finding was not disturbed on appeal.

Petitioner then alleges that Colorado law required additional warnings, beyond *Miranda*, in the circumstances of this case. Surely, the requirements of Colorado law must be determined in the first instance by the Colorado courts. The Colorado Supreme Court did not speak at all to the issue of warnings, evidently being content with the decision reached by the trial court on its interpretation of the requirements of Colorado law.

The alleged federal question, therefore, that formed no part of the Colorado Supreme Court decision, cannot properly support United States Supreme Court jurisdiction on a writ of certiorari.

ARGUMENT

1. Certiorari should not be granted under Rule 19(1) (a), because the State Supreme Court has not addressed itself to any federal question, but has based its decision entirely on State law.

Rule 19(1) (a) of the Revised Rules of the Supreme Court of the United States states:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring

> the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Since earliest times, this rule, and its predecessors have been interpreted to mean that the United States Supreme Court will not take jurisdiction of a case unless the decision in the state court was *based* upon a federal question.

> "We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and *that it was actually decided*, or that the judgment as rendered could not have been given without deciding it." *Brown v. Atwell, Administrator*, 92 U.S. 327, 341, 23 L.Ed. 511 (1875.) (Emphasis added.)

Similarly, the Court has stated that:

> "The first and only question necessary to be decided in the present case is, whether this court has jurisdiction.
>
> "To bring a case for a writ of error or an appeal from the highest court of a State, within the twenty-fifth section of the Judiciary Act, it must appear on the face of the record, 1. That some of the questions stated in that section did arise in the State court; and, 2. That the question was decided in the State court, as required in the section.
>
> "It is not enough, that the record shows that 'the plaintiff in error contended and claimed' that the judgment of the court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and

'that this claim was overruled by the court'; but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment . . .It is the peculiar province and privilege of the State courts to construe their own statutes; and is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary.

"We are of opinion, therefore, that this case must be dismissed for want of jurisdiction." Commercial Bank of Cincinnati v. Buckingham's Ex'rs., 46 U.S. 317, 12 L.Ed. 169, 181 (1847.)

In 1934 the United States Supreme Court stated that:

> ". . . jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record. It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.
>
> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.

> "As the record fails to show jurisdiction in this Court, the writ of certiorari is dismissed as improvidently granted." *Lynch v. New York*, 293 U.S. 52, 54-55, 55 S.Ct. 16, 79 L.Ed. 191 (1934.)

In 1953, the United States Supreme Court, speaking through Mr. Justice Jackson, stated simply "Of course we will not undertake to review what the court below did not decide." *Walters v. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1953.)

The same line of authority remained firm in 1972, when the Court stated, *Per Curiam*:

> "We granted certiorari in this case, . . .to consider questions seemingly presented under the constitutional guarantee against double jeopardy. After briefing and oral argument, it now appears that those questions are so interrelated with rules of criminal pleading peculiar to the State of Tennessee, the constitutionality of which is not at issue, as not to warrant the exercise of the certiorari jurisdiction of this Court . . .See U.S.Sup.Ct. Rule 19(1) (a). The writ is, therefore, dismissed as having been improvidently granted." *Duncan v. Tennessee*, 405 U.S. 127, 92 S.Ct. 785, 31 L.Ed.2d 86 (1972.)

Like results have been reached in *Department of Motor Vehicles of State of California v. Rios*, 410 U.S. 425, 93 S.Ct. 1019, 35 L.Ed.2d 398 (1973); *California v. Krivda*, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972); *Mental Hygiene Dept. v. Kirchner*, 380 U.S. 194, 85 S.Ct. 871, 13 L.Ed.2d 753 (1965); *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962); *Enterprise Irrig. Dist. v. Canal Co.*, 243 U.S. 157, 37 S.Ct. 318, 61 L.Ed. 644 (1917), among others.

In the face of such consistent adherence to the principle of judicial self-restraint, it would be unusual, indeed, if the Supreme Court were to grant certiorari under Rule 19(1) (a) in the instant

case where no federal question, statute, or case was even *discussed* by the Colorado Supreme Court in affirming Petitioner's conviction of conspiracy.

2. A matter of State law does not become a federal question merely because of Petitioner's allegation that it is so.

A. Alleged requirements of State laws must be determined in the first instance by State courts.

Petitioner has alleged that "*the rule in Colorado* is that a 'potential defendant before a grand jury' must be 'fully advised *both* of his constitutional rights *and* that he is the subject of the investigation.' *People v. Austin*, 159 Colo. 445 . . .(1966)." (Petition of Petitioner pp. 8-9.) (Emphasis added.)

Certainly, if this be a state law, it must first be determined by the State courts. *Walters v. City of St. Louis, supra.*

The law, if it exists, was set forth in *People v. Austin*, 159 Colo. 445, 412 P.2d 425 (1966) in a fact situation in which the defendant *had* been "fully advised both of his constitutional rights and that he . . .[was] . . .the subject of the investigation." *People v. Austin, supra*, at 448. The issue in that case was *not* whether defendant had been properly advised of his rights, but whether testimony which he had given after advisement could be used against him. Thus, because there was no problem in the adequacy of the advisement, the case did *not* determine the particular steps necessary for advisement in Colorado.

But even if the Colorado courts had been mistaken in the application of Colorado law, that mistake would still not create a federal question.

> "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decision . . . [or] immunity from judicial error.' [Citations omitted.] Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question.

> Finally, were we to vacate this conviction because of a failure to follow certain procedures although it has not been shown that their ultimate end—a fair grand jury proceeding—was not obtained, we would be exhaulting form over substance contrary to our previous application of the Equal Protection Clause." *Beck v. Washington*, 369 U.S. 541, 554-555, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962).

B. Where, as in the instant matter, the state trial court finds that sufficient *Miranda* warnings have been given, that finding may not be disturbed on appeal in the absence of manifest error, and here the record discloses no such error.

Petitioner seeks to *create* a federal question in this case by reference to *Miranda*. But full, adequate *Miranda* warnings *were given* to Petitioner *before* he gave the testimony he here claims should have been suppressed.

We here quote from the record, the advisement given, and the findings made by the trial court:

> "MR. LITTLE: Can I read into the record the advisement?
>
> "Q. Mr. Broncucia, before we ask you any questions, I would like to advise you of your pertinent legal rights. You have been called here to testify by the Grand Jury pursuant to an investigation the Grand Jury is conducting at this time. Before we enter into any questioning at all, I must advise you that you have the right to remain silent in that you may refuse to answer any questions that you feel may tend to incriminate or degrade you.
>
> "You don't have a blanket right to refuse to testify. You have a right to refuse to testify only if you feel the questions may tend to degrade or incriminate you. It's commonly called the Fifth Amendment right.
>
> "You have a right to consult with an attorney and have him explain your rights to you. If you cannot afford an attorney, the Court will appoint an attorney for you."

The trial court found the advisement to be sufficient both as to the special requirements of Colorado law and as to federal constitutional requirements:

> "There is an absence of evidence at this point in the record that the defendant was at that time a putative defendant or suspicion had focused on him to the extent that perhaps further advisement might have been in order, but the Court has no evidence before it at this point to conclude that the defendant was a focused-on defendant. However, so the record will be complete, even assuming the defendant was a putative defendant, the Court believes that the advisement given to him at that time was an adequate advisement to properly apprise him of his constitutional rights."

The full record of the advisement and the findings of the trial court are attached hereto as Appendix B and incorporated here by this reference.

Thus, the trial court found that *Miranda* warnings were given and that such warnings were adequate to advise Petitioner of his rights.

It is true that Petitioner continued to mention the *Miranda* question, with many other issues, in his brief to the Colorado Supreme Court. But the Colorado Supreme Court, having the full record before it, did not consider Petitioner's *Miranda* arguments to have enough merit to require even minimal discussion. So there is no mention of a *Miranda* issue in the decision by the Colorado Supreme Court.

Petitioner himself did not take the *Miranda* allegation seriously enough to have raised it on oral argument before the Colorado Supreme Court (Petition of Petitioner p. 6).

> "Nor can claim of jurisdiction be sustained by reference to *briefs* and statements which are not part of the record." *Lynch v. New York, supra* at 293 U.S. 54. (Emphasis added.)

C. An alleged federal question, which formed no part of the State Supreme Court decision, should not form the basis for United States Supreme Court jurisdiction on a writ of certiorari.

We therefore, return to the primary issue of this petition for certiorari. Is this, in fact, a case in which a "state court has *decided* a federal question of substance?"

The Respondent asserts that no federal question has in fact been decided by the Colorado Supreme Court. Certainly there are no citations to federal statutes or decisions in the opinion of the Colorado Supreme Court. Whatever federal issues Petitioner may have attempted to create below, those issues simply were not deemed to have been authentic enough to require even serious consideration by the Colorado Supreme Court. It would seem highly unusual for a state court to "decide" an important federal question without mentioning it.

CONCLUSION

The Supreme Court should not grant certiorari, under Rule 19(1) (a), because no federal question was, in fact, decided by the Colorado Supreme Court.

Respectfully submitted.

JOHN D. MacFARLANE, Attorney General
JEAN E. DUBOFSKY, Deputy Attorney General
JAMES W. WILSON, Assistant Attorney General
DALE TOOLEY, District Attorney
BROOKE WUNNICKE, Special Prosecutor

ATTORNEYS FOR RESPONDENT

March 16, 1976.

APPENDIX A

The PEOPLE of the State of Colorado,
Plaintiff-Appellee,
v.
Anthony L. BRONCUCIA, Defendant-Appellant.
No. 26557.

Supreme Court of Colorado,
En Banc.
September 15, 1975.
Rehearing Denied October 20, 1975.

GROVES, Justice.

This is a companion case to *People v. Ciari*, Colo., 540 P.2d 1094, and *People v. Quintana*, Colo., 540 P.2d 1097, announced contemporaneously with this opinion. Defendant appeals from convictions of perjury, and conspiracy to commit perjury. We reverse as to the perjury conviction and affirm as to the conspiracy conviction.

An extradition hearing was held upon one Griswold's application for a writ of habeas corpus contesting Griswold's extradition to Nevada for criminal proceedings against him involving an alleged "diamond switch." The evidence shows that the defendant gave Griswold a receipt for expenses resulting from a birthday party which was supposed to have been held at the defendant's place of business, Mickey's Inn, in Denver on February 7, 1970. The receipt was introduced at the extradition hearing for the purpose of showing Griswold's presence in Denver on the day of the alleged diamond switch. Although defendant declined to testify at the extradition hearing, he did testify at subsequent grand jury proceedings. This testimony, the People allege, corroborated the testimony given by alleged co-conspirators at the extradition hearing, all of which supported Griswold's alibi.

The resulting grand jury indictment, alleged that defendant committed perjury by testifying falsely before the Denver Grand Jury as follows:

"Q Specifically, Mr. Broncucia, relating to the date of February 7th, did you see Mr. Griswold on that date?

"A Well, if you can allow me to explain a little bit.

"Q Yes, if you would, please.

"A I don't particularly know whether that's the particular date. I know he was there on a Saturday, but actually the date, I don't recall it, you know.

"Q I see. What do you recall about whatever date it was that he was there?

"A Well, they were there, and he had a party. I believe it was a birthday party for his girlfriend or wife.

"Q Would that be Linda Wilson?

"A I don't know.

"Q Could you describe that girlfriend?

"A I sure couldn't.

"Q Did you know any of the people there?

"A Yes, some of them.

"Q And who were the names that you recall?

"A Robert Quintana was present, but I wasn't—I am divorced, and I get my child weekly, and I wasn't present at the party all day long or anything. I just—

"Q Do you recall what kind of a party it was specifically?

"A It was a birthday party.

"Q Now, let me make sure before we conclude that I understand your testimony. Your testimony is that on the date of the party in February 1970—and you are not sure whether that's the 7th, but you are sure it's a Saturday—

"A I'm sure it's on a Saturday, and I'm almost sure it's February. I guess I could be wrong and it could be the last Saturday of January or something like that, but—

"Q But there was a party Mr. Griswold gave for some young lady and at this party you gave him a receipt before he left Mickey's Inn that date?

"A Yeah.

"Q And the receipt is not the same receipt as we have here today before you, Grand Jury Exhibit A?

"Q That you did give him a receipt on that date?

"A I gave him a receipt on the day of the party."

I

[1] Defendant contends that the perjury charge failed to set forth with sufficient specificity the falsity of the defendant's statements so as to enable him to prepare his defense. We agree.

The device by which the defendant was charged with perjury in the indictment was a verbatim partial transcript of the defendant's actual testimony before the grand jury. There was no averment of fact to demonstrate the falsity of the testimony on which the charge was based. The failure to aver the true facts has been held to be proper when the truth of the disputed matter was clear by "necessary implication" so that the defendant will be apprised of the reasons for his statements being charged as false. *People v. Mazza*, 182 Colo. 166, 511 P.2d 885 (1973). Here, however, in the light of the defendant's equivocations and the failure of the People to prove the falsity of the defendant's equivocal testimony, his conviction of perjury cannot stand.

II

The defendant asserts that the charge in Count Ten is fatally defective in that it is duplicitous, *i. e.*, it charges two separate and distinct crimes of conspiracy in one count. *See Marrs v. People*, 135 Colo. 458, 312 P.2d 505 (1957). Count Ten charged a conspiracy to commit perjury between February 7, 1970, and August 1, 1973. He contends that Count Ten in fact charges two separate and distinct conspiracies: one, to commit perjury at the extradition hearing, and, two, to commit perjury during the grand jury proceedings. He argues that the object of the first conspiracy was to prevent the extradition of Griswold, while the object of the second conspiracy, if there was one, must have been to avoid criminal prosecution.

[2,3] In a prosecution for conspiracy, considerable latitude is allowed because of the inherent problems of proof involved in proving a crime, the veil around which is secrecy. This court, in *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973), stated:

> "Since conspiracy is a crime that is born in secrecy and bred in the alleys of deceit, it is often impossible for the prosecution to define the four corners of a conspiracy, either as to members or as to objects. Often, the prosecution cannot determine the extent of a conspiracy or the identity of the members of the conspiracy at a particular time until all the evidence is in."

In this case, as in *People v. Incerto, supra*, the defense was not surprised by the proof, nor were the substantial rights of the defendant affected, and thus reversible error did not occur.

The defendant made a motion for a bill of particulars as to Count Ten, which motion was granted. The resulting bill of particulars set forth that the defendant executed and delivered a receipt dated February 7, 1970, and attended meetings between the coconspirators, all before the date of the extradition hearing. This gave the defendant adequate notice as to the charge the People

would attempt to prove—a conspiracy to commit perjury at the extradition hearing.

Included in the bill of particulars, was the allegation that the defendant gave false testimony before the Grand Jury on July 14, 1972. This statement was not improperly included against the defendant as it tended to show his participation in the conspiracy, even though the object of the conspiracy charged (the defeat of the extradition of Griswold) had by that time failed.

Moreover, the court instructed the jury that the conspiracy charge related to the extradition hearing, thereby avoiding the possibility that the defendant could have been convicted of conspiracy to commit perjury before the Grand Jury.

We find no substantial prejudice in the charge or in the instruction and, therefore, affirm.

The judgment is reversed as to perjury and is affirmed as to the conspiracy conviction, and the cause is remanded for disposition consonant with the views expressed in this opinion.

ERICKSON, J., recuses himself.

APPENDIX B

MR. LITTLE: Can I read into the record the advisement?

"Q Mr. Broncucia, before we ask you any questions, I would like to advise you of your pertinent legal rights. You have been called here to testify by the Grand Jury pursuant to an investigation the Grand Jury is conducting at this time. Before we enter into any questioning at all, I must advise you that you have the right to remain silent in that you may refuse to answer any questions that you feel may tend to incriminate or degrade you.

You don't have a blanket right to refuse to testify. You have a right to refuse to testify only if you feel the questions may tend to degrade or incriminate you. It's commonly called the Fifth Amendment right.

You have a right to consult with an attorney and have him explain your rights to you. If you cannot afford an attorney, the Court will appoint an attorney for you.

May I first ask, do you have an attorney?

A Yes, I do.

Q And his name, please?

A Ed Towey.

Q And how do you spell that?

A T-o-w-e-y.

Q And did Mr. Towey accompany you here today?

A Yes, he has.

Q And have you had occasion to consult with him regarding your legal rights?

A Yes, I have.

Q And is he out in the hall at this time?

A Yes, he is.

Q I would advise you that if at any time you have a question as to whether or not any answer you may give may tend to incriminate you or degrade you that you may seek the advice of counsel. In other words, you may ask permission to leave the Grand Jury Chambers and may consult with Mr. Towey. Do you understand each of the rights I have given you at this time?

A Yes, I do.

Q Knowing these rights, do you wish to voluntarily testify before the Grand Jury?

A Yes, I do."

I think that is a complete warning; it is more than adequate, and we would stand on it, your Honor.

THE COURT: Based upon the evidence before the Court, the Court will find on or about July 14, 1972, the defendant appeared before the Grand Jury, a special statutory Grand Jury, and was accompanied by counsel, Mr. Edward Towey, and the defendant was sworn in and immediately thereafter was advised that he was called before the Grand Jury pursuant to an investigation the Grand Jury was conducting at that time. Before any questioning, the defendant was advised that he had a right to remain silent and to refuse to answer any questions that he felt might tend to incriminate or degrade him, and that he had a right to consult with an attorney and have him explain the rights to him, and if he could not afford an attorney, the Court would appoint one for him. The defendant was thereafter asked whether or not he had an attorney, and the defendant stated that he did; and his attorney, Mr. Towey, had accompanied the defendant to the Grand Jury proceeding. The defendant further

responded that he had occasion to consult with Mr. Towey regarding his legal rights, and Mr. Towey was then out in the hall outside the Grand Jury room. The defendant was then advised that if at any time he had any question as to whether or not he should answer any question that might tend to incriminate him or degrade him, he could seek the advice of counsel and expressly request permission to leave the Grand Jury Chambers and consult with his attorney, Mr. Towey. The defendant was asked whether he understood these rights, and he stated that he did. And he was then asked knowing these rights, did he voluntarily wish to testify before the Grand Jury, and the defendant stated that he would. The Court would further find thereafter the defendant was interrogated in the course of the Grand Jury investigation and made various responses to questions, and the questions and answers are set forth in Defendant's Exhibit Number 1 which has been admitted for the purpose of this hearing.

The Court would conclude that the defendant was properly advised of his constitutional rights of self-incrimination and his privilege to refuse to answer any questions. He was properly advised that he had a right to an attorney and the right to confer with an attorney, and the Court would further find that the defendant's attorney did, in fact, accompany the defendant to the Grand Jury hearing; and the defendant had previously conferred with his counsel with respect to his rights at the Grand Jury proceeding. Based upon the record as made, the Court would conclude that the defendant fully understood his privilege against self-incrimination and his right to refuse any questions that might tend to incriminate him, and the defendant fully understood his right to counsel. Based upon the record as made and the warning as set forth in Defendant's Exhibit Number 1, and the fact that the defendant had, in fact, conferred with counsel prior to appearing before the Grand Jury and had counsel accompany him, the Court would conclude the only reasonable inference that can be drawn is that the defendant knew that anything he said before the Grand Jury could and would be used against him. Knowing all of these things, the defendant freely and intelligently waived his constitutional rights and proceeded to testify before the Grand Jury. The Court believes that while the advisement

is not ideally consistent with the four corners of Miranda, nevertheless, the defendant, based upon the record, fully understood his Miranda rights and fully understood his privilege against self-incrimination and his right to refuse to answer any incriminatory questions and further understood that any responses he did make could and would be used against him. The Court would note for the record the recent case of *People v. Spencer* at 512 P.2d, page 260, where the defendant was convicted of perjury and claimed that the trial court erred in not suppressing the defendant's testimony before the Grand Jury because of the failure to advise them of their right against self-incrimination. The Grand Jury testimony was admitted, and the Supreme Court affirmed the defendants' conviction; and I would merely state this for the record the court stated that, "It has long been the law in Colorado that a defendant cannot be called before a Grand Jury which is investigating the suspected offenses unless the putative or focused-on defendant is fully warned of his or her privilege against self-incrimination. This principle remains true, of course, even though the focused-on defendant is not yet formally charged. Admittedly, the Spencers were not given any warning when they appeared before the Grand Jury. The required warning, however, relates to admissions concerning past acts, and its absence does not grant witnesses the right to commit perjury before the Grand Jury.

"The Fifth Amendment grants a witness the right to remain silent and not incriminate himself. However, the constitutional protection extends only to past acts, not to those that are or may be committed in the future." The Court pointed out when the Spencers testified before the Grand Jury they did not incriminate themselves in regard to a past offense but committed the crime of perjury by their statement relating to the alleged assault incident under investigation. The court further noted that the Spencers were indicted for their alleged false testimony and not for previous conduct which they admitted by their testimony before the Grand Jury. The Court believes that the *Spencer* case is very close factually to the situation at hand, and we do have in this particular case the additional warning given by the District Attorney prior to his questioning

before the Grand Jury which the Court has ruled was adequate; and we do have the voluntary waiver of the defendant after being advised of his rights, and we do have the fact that the defendant was accompanied by counsel prior to his appearance before the Grand Jury and had, in fact, conferred with counsel concerning his rights.

There is an absence of evidence at this point in the record that the defendant was at that time a putative defendant or suspicion had focused on him to the extent that perhaps further advisement might have been in order, but the Court has no evidence before it at this point to conclude that the defendant was a focused-on defendant. However, so the record will be complete, even assuming the defendant was a putative defendant, the Court believes that the advisement given to him at that time was an adequate advisement to properly apprise him of his constitutional rights. And from the record as made, the Court can only conclude that the defendant freely and intelligently waived those rights and proceeded to testify before the Grand Jury. So, for these reasons, the motion to suppress will be denied. Now, any other preliminary matters?

CERTIFICATE OF SERVICE

I do hereby certify that on the 16th day of March, 1976, I placed in the United States mails, postage prepaid and properly sealed and addressed, a true and correct copy of the foregoing Brief for the Respondent in Opposition to: EDWARD B. TOWEY, Attorney for Petitioner, 1701 West 72nd Avenue, Suite 210, Denver, Colorado 80221.

BROOKE WUNNICKE
Special Prosecutor